

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding)	MB Docket No. 10-190
<i>Zevo-3</i>)	

REPLY COMMENTS OF CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD

Matthew Rich

Law Student
Georgetown University Law Center

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Angela Campbell, Esq.
Guilherme Roschke, Esq.
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

Counsel for Campaign for a Commercial-
Free Childhood

SUMMARY

Campaign for a Commercial Free Childhood (CCFC) urges the Commission to promptly issue a declaratory ruling that Nicktoons' airing of *Zevo-3* violates the Children's Television Act (CTA) and/or the FCC's rules and policies concerning advertising to children. The vast majority of the over 1,500 comments from public health organizations, children's media advocates, parents and academics support CCFC's request. The only significant opposing comments are from the two parties directly affected by CCFC's request – MTV, the parent of cable network Nicktoons, and Skechers, the company that produces *Zevo-3* and whose shoes it promotes – and a coalition of advertising trade associations. Their opposition, which is consistent with their economic self-interest rather than what is best for children, is based on omissions and misstatements of both fact and law.

The FCC rules define commercial matter as “air time sold for purposes of selling a product.” Skechers and MTV, the only parties with knowledge of the financial arrangements under which *Zevo-3* is aired, could have supported their claim that the program is not a commercial by demonstrating that no consideration changed hands. Since they failed to do so, it is reasonable to infer that MTV did receive consideration for airing the program. To ensure compliance with the children's advertising limits, CCFC asks the Commission to investigate whether Nicktoons received consideration for airing *Zevo-3*.

Even if the Commission determines that entire *Zevo-3* program is not a paid commercial, however, it still violates FCC policies requiring clear separation of commercial and programming matter. Skechers does not deny that it has long used the spokescharacters in *Zevo-3* -- Z-Strap, Elastika, and Kewl Breeze -- to market shoes on its website, in comic books inserted in shoe boxes, and in television commercials. Using the same super hero

spokescharacters that originated as advertising in a children's television program takes unfair advantage of young children's inability to distinguish between programming and advertising and the trust they place in such characters. Even older children, who can recognize the difference between a program and a commercial spot, are not likely to perceive this program as a commercial because the spokescharacters are completely integrated in the show.

Contrary to their claims that no shoes or brand names are mentioned during the program, two of the spokescharacters, Z-Strap and Elastika, have the same name as a line of Skechers' sneaker. Thus, every mention of Z-Strap or Elastika by name directly promotes Skechers shoes. Through online marketing and television commercials, Skechers has also created a close association between Kewl Breeze and Airators sneakers. Children, as well as adults, do not draw fine distinctions between the name of the spokecharacter and the name of the shoe, often using them interchangeably. The use of the characters and the names of the shoes in the program are classic examples of embedded advertising, which the Commission, just two years ago, found would violate its separation policy if placed in children's programming.

Opposing commenters are also wrong in claiming that *Zevo-3* is no different than many other children's programs featuring characters that are also toys. The difference is that *Zevo-3* revolves around three spokescharacters that have had no purpose other than to promote Skechers' shoes. Moreover, Skechers continues to use these same characters on its website and in television commercials to market its shoes. Granting CCFC's Petition would not render other existing programs unlawful, while denying the Petition would open the floodgates to programs based on popular spokescharacters, including many used to promote unhealthy foods.

Although Nicktoons' airing of *Zevo-3* violates existing law and policy, CCFC supports revisiting the children's television rules. The nature of marketing and children's media has

changed significantly since 1991, when the Commission adopted the rules implementing the CTA. As Dr. Dale Kunkel suggests in his Comments, the Commission could issue a declaratory ruling that *Zevo-3* violates the separation principle, and, at the same time, issue a Notice of Proposed Rulemaking to consider revisions to its policy on children's advertising.

Finally, issuing the declaratory ruling does not raise constitutional issues. Since neither the CTA nor the FCC rules and policies regarding children's advertising have been found to violate the First Amendment, neither should the application of these laws and policy to a particular set of facts.

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Campaign for a Commercial-Free Childhood (“CCFC”), by its attorneys, the Institute for Public Representation, respectfully submits these reply comments in support of its request that the FCC issue a declaratory ruling that the children’s program *Zevo-3* is violates the Children’s Television Act (“CTA”) and Commission rules and policies with regard to advertising on children’s programs.

I. The Majority of Comments Support CCFC’s Request

To date, the FCC has received over 1,500 comments in response to its Public Notice seeking public comment on CCFC’s petition.¹ The vast majority support CCFC’s request. For example, the Food Marketing Work Group (which represents more than 120 organizations and individuals, including Center for Science in the Public interest, Robert Wood Johnson Foundation Center to Prevent Childhood Obesity, and Yale’s Rudd Center for Food Policy and Obesity, as well as David Britt, the former CEO of Sesame Workshop) (“FMWG”) supports CCFC’s request because of concern that failure to draw the line at this type of marketing to

¹ Comment Dates Established for Campaign for a Commercial-Free Childhood Petition for a Declaratory Ruling that a Program to be Aired by Nicktoons Violates the Children’s Television Act and the FCC’s Rules and Policies, MB Docket No. 10-190, DA 10-1762 (Sept. 22, 2010).

children would result in “a significant increase in the marketing of junk food to children via the use of commercial spokescharacters in program content.”²

Numerous other organizations and academics, including the American Academy of Child and Adolescent Psychology, the American Academy of Pediatrics, Children Now, Parents Television Council, the United Church of Christ and the US Catholic Conference of Bishops, and Dr. Sandra Calvert, Director of the Children’s Digital Media Center at Georgetown University, signed a letter supporting CCFC’s petition.³ Free Press supports the petition, noting that commercials that appear to be programs are “particularly offensive when . . . directed towards the most vulnerable television viewers – *children*.”⁴ Dr. Dale Kunkel, the well-known scholar who has studied children and advertising for over 25 years, suggests ways that the FCC could address the problems raised by the Zevo-3’s excessively commercial nature.⁵

In addition, over a thousand individuals wrote to urge the FCC to find that Zevo-3 is a commercial length program in violation of FCC rules. For example, one, who describes herself as a “mother, an attorney, and a former advertising executive” writes:

In my home, I've educated my children about commercialism and taught them to be critical thinkers. This does not stop the interference of mass media in my home or in anyone's home. So much more entrenched marketers are, then, in homes where parents do not or cannot teach their children to be critical.

And that is the thrust of CCFC's Petition. CCFC is asking the FCC to step in and tell children's marketers that there is a limit. Not many. But there is one, and Skechers has reached it with Zevo-3.

* * *

I am a Skechers fan. I love their shoes and my kids have worn them for years. Nevertheless, I don't agree with their marketing strategy and I will stop buying Skechers if they continue on this path.

* * *

² Food Marketing Work Group at 1.

³ Jeff McIntyre at 2.

⁴ Free Press at 2.

⁵ Kunkel Comments at 15-17.

As a parent and an attorney, I hope you will take the right stand, the only stand, on this that makes sense and declare that there are places where children will not be targeted for profit.⁶

II. Comments Opposing CCFC's Request for Declaratory Ruling are Based on Misstatements or Omissions of Fact and Law

Only three significant filings opposed CCFC's request: MTV Networks (the parent company of Nicktoons), Skechers USA, and a joint filing of the Association of National Advertisers, Inc., American Advertising Federation and American Association of Advertising Agencies (collectively "opposing comments").⁷ All have a financial stake in the Commission allowing the airing of *Zevo-3*. No cable network other than MTV defended Nicktoons' airing of *Zevo-3*.

None of the opposing comments denies that *Zevo-3* is a children's program as that term is defined by the Commission. Instead, they make three arguments against granting the declaratory ruling. First, they contend that *Zevo-3* is not a commercial or program-length commercial and does not violate FCC rules requiring the separating of program and commercial content. Second, they argue that granting the declaratory ruling would require a change in Commission rules and would somehow undermine the provision of any children's programs. Third, they contend that granting the petition would raise First Amendment issues. As we show below, each of these arguments is wrong.

⁶ Martha J. Hartney. *See also* Mary L. Rothschild ("It is incumbent on the FCC to enforce the spirit as well as the letter of its policies. Since the power of the media industry far outweighs public awareness of the implications of commercialism on that development, it is grossly unfair to expect parents and those who care for young children to have the ability to understand the implication of this programming."); Rachael Hilliker ("As a mother, I find their plans to target market children by way of industry specific cartoons deceptive and unethical. I urge you to carefully consider the long-term implications of allowing such programming to air.").

⁷ MTV; Skechers; ANA et. al.

A. Skechers does not deny paying consideration, nor does MTV Networks deny receiving consideration for Showing Zevo-3

FCC rules define commercial matter as “air time sold for purposes of selling a product or service.”⁸ In adopting this definition, the Commission explained that in “requiring that air time be “sold,” we mean that the advertiser must give some valuable consideration either directly or indirectly to the broadcaster or cablecaster as an inducement for airing the material.”⁹ It further explained that the furnishing of material for airing may qualify as consideration and that some barter arrangements involve consideration.¹⁰

Skechers and MTV, the only parties with knowledge of the financial arrangements under which Zevo-3 is aired, could have supported their claim that the program is not a commercial by demonstrating that no consideration changed hands. Since they failed to do so, it is reasonable to infer that MTV did receive consideration for airing the program. To ensure compliance with the children’s ad limits, it incumbent upon the Commission to investigate whether Nicktoons did receive consideration for airing *Zevo-3*.

B. Zevo-3 Violates FCC Policies Requiring Clear Separation of Programming and Commercial Matter

Even if the Commission determines that the entire *Zevo-3* program is not a paid commercial, *Zevo-3* still violates FCC policies requiring clear separation of commercial and programming matter. As Dr. Kunkel explains in his comments, the Commission’s policy of requiring clear separation dates to the 1974 Policy Statement.¹¹ There, the Commission found that “children -- especially young children -- have greater difficulty distinguishing programming

⁸47 CFR §76.225 note 1.

⁹ Policies and Rules Concerning Children’s Television Programming, 6 FCC Rcd 2111, 2112 (1991), recon. granted in part, 6 FCC Rcd 5093 (1991) (“CTA Implementation Order”).

¹⁰ *Id.* at 5093 n.19.

¹¹ Kunkel Comments at 6.

from advertising than adults. If advertisements are to be directed to children, then basic fairness requires that at least a clear separation be maintained between the program content and the commercial message so as to aid the child in developing an ability to distinguish between the two.”¹² For this reason, the Commission stated that children’s programs and advertisements should be clearly separated by using “bumpers.”

The Commission also found that host selling should be eliminated from children’s programs because:

the use of a program host, or other program personality, to promote products in the program in which he appears is a practice which is consistent with licensees’ obligation to operate in the public interest. One effect of “host-selling” is to interweave the program and the commercial, exacerbating the difficulty children have distinguishing between the two. In addition, the practice allows advertisers to take unfair advantage of the trust which children place in program characters.¹³

When the CTA was adopted in 1990, the Committee Report noted that its purpose was “much the same as that reflected by the FCC’s policy in 1974: to protect the interest of children by limiting the amount of commercial matter presented during children’s programs.”¹⁴ The House Report found that “[i]t is well established by scientific evidence that children are uniquely susceptible to the persuasive messages contained in television advertising.”¹⁵ Moreover,

¹² *Petition of Action for Children’s Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children’s Programming and the Establishment of a Weekly 14-Hour Quota of Children’s Television Programs*, Children’s Television Report and Policy Statement, 50 FCC 2d 1, 14 (1974) (“1974 Policy Statement”).

¹³ *Id.* at 13.

¹⁴ H.R. Rep. No. 101-385, 1990 U.S.C.C.A.N. 1605, 1612 (1990). Indeed, it explicitly noted its agreement with the FCC policies regarding host-selling, separations, and program length commercials. *Id.* at 1621. *See also* S. Rep. No. 101-227, at 1 (1989) (“The objective of this legislation is to increase the amount of educational and information broadcast television programming available to children and to protect children from overcommercialization of programming.”).

¹⁵ H.R. Rep. No. 101-385, 1990 U.S.C.C.A.N. 1605, 1610 (1990). *See also* S. Rep. No. 101-227, at 27 (1989) (“It is recognized that some children, particularly very young children, may not be able to understand fully the concept of sponsorship no matter how it is explained.”).

children's inability to discriminate programs from commercials and recognize commercials' persuasive intent

lead children to interpret the information contained in advertising messages no differently than all other types of information conveyed by television programming. Young children are neither wary nor skeptical of commercial claims and appeals and therefore tend to place indiscriminate trust in television advertising. Young children who cannot recognize the difference between a program and a commercial certainly cannot be expected to react aversively to an excessive amount of advertising by changing the channel or turning off the television.¹⁶

In implementing the CTA, the Commission confirmed that it would continue to enforce its policies requiring clear separation and against host selling and program length commercials.¹⁷ In 2005, the Commission clarified that the commercial limits and policies applied to "all digital video programming directed to children ages 12 and under, whether that programming is aired on a free or pay digital stream" because "the same concerns that led to adoption of the advertising restrictions in the *1974 Policy Statement* and the CTA – the unique vulnerability of children as television viewers - apply regardless of the channel that a child viewer watches."¹⁸

1. Zevo-3 violates the separations policy because the main characters – the super heroes Z-Strap, Elastica, and Kewl Breeze – have been used by Skechers for years and continue to be used to promote sneakers

Skechers does not deny that it has long used the super heroes in *Zevo-3* -- Z-Strap, Elastica, and Kewl Breeze -- to market shoes on its website, in comic books inserted in the shoe boxes, and in television commercials. For example, Skechers's website urges

¹⁶ H.R. Rep. No. 101-385, 1990 U.S.C.C.A.N. 1605, 1610-11 (1990). *See also* S. Rep. No. 101-227, at 9 (1989) ("However, since young children do not have the cognitive ability to distinguish commercial matter from program matter, they cannot react negatively to overcommercialization of programming.").

¹⁷ 6 FCC Rcd at 5097-98.

¹⁸ *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943, 22960 (2005).

children to “Join Kewl Breeze and his Airators in the fight against stinky feet!”¹⁹

Similarly, Skechers tells children that they can “[s]ave the day with the heroic style of Elastika and her SKECHERS Bungees sneakers. A breeze to slip on, *Elastika shoes* have stretchy Bungee laces for a stay-put fit.”²⁰

When the same super hero spokescharacters that appear in advertising appear in a children’s television program, it takes unfair advantage of young children’s inability to distinguish between programming and advertising and the trust they place in such characters. Even older children, who can recognize the difference between a program and a commercial spot, are not likely to perceive this program as a commercial because the spokescharacters are completely integrated in the show.

MTV’s claim that “the characters that appear in *Zevo-3* are wholly divorced from their commercial manifestations in Skechers promotional materials”²¹ is at odds with the facts. At the same time *Zevo-3* is showing on Nicktoons, Skechers is promoting its shoes using the characters on its website and in television commercials (albeit not aired during the program itself). A child performing a web search to learn more about the character Z-Strap, for example, would immediately find promotions for Skechers sneakers.²² On Google, the top result for a search using the term “z-strap” is a Skechers webpage entitled “Z-Strap Shoes,” where Z-Strap sneakers are available for purchase. Another result on the first search page links two television commercials of Skechers Z-Strap sneakers on Youtube.

¹⁹ SKECHERS AIRATORS, *Skechers Brands*, http://www.skechers.com/info/brand_page#skechers_airators (last visited Nov. 8, 2010).

²⁰ Elastika, *Skechers Brands*, http://www.skechers.com/info/brand_page#elastica (last visited Nov. 8, 2010) (emphasis added).

²¹ MTV Comments at ii.

²² See Att. A (screenshot of a Google search for “z-strap”). In addition to the websites discussed, this search also reveals third party advertisements for Z-Strap sneakers. Att. A.

Moreover, despite MTV's insistence otherwise, *Zevo-3*'s plot is clearly tied to Skechers marketing efforts. For example, *Zevo-3*'s villain Dr. Stankfoot (aka Stan K. Foot) appears in Skechers commercials as well. A Skechers television commercial boasts that the Airators technology means "Stankfoot doesn't stand a chance."²³

2. Skechers and MTV are Wrong in Claiming that *Zevo-3* Does not Mention Shoes by Name

Skechers contends that *Zevo-3* does not involve host selling because "[n]either the Skechers brand nor any specific Skechers shoes will be mentioned by the *Zevo-3* characters during the show."²⁴ Similarly, MTV asserts the show is "devoid of references to or promotion for Skechers footwear" and "neither the Skechers logo nor its brand name ever appears in an episode of *Zevo-3*."²⁵

Contrary to the claims that no shoes or brand names are mentioned during the program, both Z-Strap and Elastika have the same name as a Skechers' sneaker. Skechers' website contains a "Z-Strap Shoes" webpage with fifty-seven different shoes for sale.²⁶ The page also prominently includes an image of the Z-Strap spokescharacter with the slogan "never tie your shoes again." Clicking on a specific sneaker refers to the shoe as a Z-Strap and displays pictures of the spokescharacters.²⁷ Similarly, Skechers has an "Elastika Shoes for Girls" webpage that contains nine sneakers for sale and a picture of Elastika next to the slogan "the incredible

²³ SKECHERS Kewl Breeze Commercial, uploaded on Skechers Commercials channel, <http://www.youtube.com/watch?v=AbML0zG6bhQ> ("stankfoot" mentioned at 0:22); SKECHERS Airators Commercial, uploaded on Skechers Commercial channel, http://www.youtube.com/watch?v=AYpF8j_18y4 ("stankfoot" mentioned at 0:21).

²⁴ Skechers Comments at 9.

²⁵ MTV Comments at 9.

²⁶ Att. B-1 (screenshot of the Skechers' webpage "Z-Strap Shoes").

²⁷ Att. B-2 (screenshot of the Skechers' webpage for the Boys' Z Strap: Grenadier – Z Trax sneaker).

Elastika Bungees from Skechers.”²⁸ Clicking on a specific sneaker also reveals Elastika prominently displayed alongside the sneaker.²⁹ Thus, every time either Z-Strap or Elastika is referred to by name in *Zevo-3*, it directly promotes a Skechers shoe model.

The third main character is also closely identified with a specific Skechers brand of sneaker. The connection between the Kewl Breeze and Airators sneakers has been intentionally created and nurtured by Skechers in its online marketing and television commercials.³⁰ In fact, the super heroes are so closely associated with the shoes that children ask for them using the names of the characters.³¹

Nor are children alone in using the brand name and spokescharacter/cartoon name interchangeably. Retailers also refer to and sell sneakers under the name of the spokescharacter. For example, Amazon.com sells a sneaker it calls the “Skechers Little Kid/Big Kid Vert-Kewl Breeze Sneaker.”³² If adults confuse the name of the shoes with the name of the characters, it is unreasonable to expect children to distinguish between the characters in *Zevo-3* and the same characters used in marketing.

3. Zevo-3 Contains Embedded Advertising in Violation of FCC Policy

Even if MTV’s claim that the “program will not include any commercial messaging for Skechers or any of its brands or products,”³³ were true, it would not follow that the program is consistent with the FCC’s separations policy. In launching a

²⁸ Att. C-1 (screenshot of the Skechers’ webpage “Elastika Shoes for Girls”).

²⁹ Att. C-2 (screenshot of the Skechers’ webpage for Girls’ Bikers – Sweet Spark sneakers).

³⁰ Att. D (screenshots from Skechers’ webpage for Boys’ Supercharger – Evoke sneakers). *See also* SKECHERS Kewl Breeze Commercial, *supra* n.25.

³¹ CCFC Petition at 1.

³² See Att. E (Screenshot from Amazon.com for the Skechers Little Kid/Big Kid Vert-Kewl Breeze Sneaker).

³³ MTV Comments at 11.

rulemaking on embedded advertising in 2008, the Commission noted that “embedded advertising in children’s programming would run afoul of our separation policy because there would be no bumper between programming content and advertising.”³⁴ Embedded advertising “describes situations where sponsored brands are included in entertainment programming.”³⁵ The term includes both product placement, i.e., the placement of commercial products as props in television programming, and product integration, i.e., the integration of a product into the dialogue and/or plot of a program.³⁶ Embedded advertising on children’s programs is unfair to children because it draws “on a program’s credibility in order to promote a commercial product by weaving the product into the program.”³⁷

As discussed above, Z-Strap is the both the name of brand of Skechers sneaker and one of the super heroes in *Zevo-3*. This is a classic example of the integration of a product into the dialogue and/or plot of the program. *Zevo-3* therefore violates the FCC’s requirements on separating programming from commercials for children’s shows.³⁸

³⁴ Notice of Proposed Rulemaking – Sponsorship Identification Rules and Embedded Advertising, 23 FCC Rcd 10682, 10691-92 (2008) (“Embedded Advertising NPRM”).

³⁵ *Id.* at 10682 n.1.

³⁶ *Id.* at 10682 n.2.

³⁷ *Id.* at 10682-83.

³⁸ MTV and Skechers are technically correct that *Zevo-3* does not violate the FCC’s definition of a program length commercial. MTV Comments at 7; Skechers Comments at 6-7. In 1991, the FCC defined a program length commercial as “a program associated with a product in which commercials for that product are aired.” *CTA Report and Order*, 6 FCC Rcd at 2117 ¶ 40. However, for the reasons discussed above, this does not mean that the program complies with the FCC’s separations requirement.

III. No Change in FCC Rules is Needed to Find *Zevo-3* in Violation of Children's Advertising Rules and Policies

Opposing comments claim that *Zevo-3* is no different than many shows already in existence and that granting this declaratory ruling would “render many children’s programs unlawful.”³⁹ CCFC disagrees. Nonetheless, CCFC would welcome a review of the adequacy of the existing rules.

A. *Zevo-3* Is Distinct From Toy-Based Programs

The opposing comments cite G.I. Joe, He-Man and Strawberry Shortcake as examples of programs similar to *Zevo-3*.⁴⁰ However, as illustrated in the list of programs provided by MTV, almost all of these programs were based on actual toys. In contrast, *Zevo-3* is built around spokescharacters created to sell sneakers.

The closest analogy to *Zevo-3* is *Yo! It's the Chester Cheetah Show!* Fox Television had planned to air this children’s program based on the cartoon spokescharacter for Frito-Lay’s Cheetos. However, Fox Television quickly dropped its plans for the show after public interest advocates petitioned the FCC, and no children’s television programs based on spokecharacters have been aired since.⁴¹

The opposing comments point out that the California Raisins appeared in television show after appearing in commercials for the California Raisin Advisory Board.⁴² However, the mere fact that a program aired without the FCC taking action against it (especially in the absence of a complaint) does not establish any sort of precedent. Moreover, the California Raisins aired in

³⁹ Skechers USA Petition at 10.

⁴⁰ *MTV Comments* at ii, 19; *see also* Skechers at 10; ANA et al. at 10.

⁴¹ CCFC Petition at 16.

⁴² *E.g.*, *MTV Comments* at 20.

1989-1990,⁴³ at a time when there were no limits on children's advertising. The FCC repealed the commercial limits for children's television in 1984.⁴⁴ However, in 1987, the D.C. Circuit found no "reasoned basis adequate to justify the FCC's termination of the children's commercialization guidelines" and remanded to the FCC.⁴⁵ Before the Commission took action on remand, Congress passed the CTA, which as described above, reinstated the commercial limits and ratified the other policies in the 1974 Policy Statement. Thus, the California Raisins program provides no basis to find *Zevo-3* consistent with current FCC rules and policy.

Moreover, acting on CCFC's Petition would not render other existing programs unlawful. To the contrary, denial or failure to act on the CCFC Petition would open the floodgates to spokescharacter-based children's television shows. As pointed out by the Food Marketing Work Group, cartoon spokescharacters such as those in *Zevo-3* "have been a prevalent practice used to promote low-nutrient high-calorie food and beverage products," and allowing *Zevo-3* to continue means that these food characters could be the basis of many new shows.⁴⁶ The Commission should not take any action that would contribute to the serious problem of childhood obesity.

⁴³ California Raisins, <http://www.imdb.com/title/tt0284709/>.

⁴⁴ Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 FCC 2d 1075 at *2 (1984) ("Revision of Commercial Policies"), recon. denied, 104 FCC 2d 357 (1986).

⁴⁵ Action For Children's Television v. Federal Communications Commission, 821 F.2d 741, 745 (D.C. Cir. 1987).

⁴⁶ *FMWG Comments* at 2. See also Bruce Vickroy ("Allowing [*Zevo-3*] will set precedent for others. They will be at a disadvantage if they do not do the same. It will create a trend with negative impact on children. Please prevent this from happening. As citizens, we depend on the FCC to do the right thing. I urge you to stop Nicktoons *Zevo-3* from airing.").

**B. Grant of the Petition Would not Endanger the
Commercial Viability of Children's Programs**

Grant of CCFC's Petition would not as MTV suggests "inhibit program producers' ability . . .to finance innovative programming"⁴⁷ or cause "severe disruptions to the production and development of children's programming."⁴⁸ As explained above, CCFC is only asking the Commission to issue a declaratory ruling in regard to *Zevo-3*. A ruling that this one program violated FCC rules and policies would not undermine the financing of children's programs.

Moreover, MTV engages in revisionist history in suggesting that the CTA was intended to permit programs such as *Zevo-3* on cable television.⁴⁹ As the House Report noted, "the purpose of the legislation is much the same as that reflected by the FCC's policy in 1974: to protect the interest of children by limiting the amount of commercial matter presented during children's programs to the greatest extent possible without negatively impacting the viability of children's programming on commercial television."⁵⁰ In adopting its 1974 Policy Statement, Commission "recognized that advertising is the sole economic foundation of the American *commercial broadcasting* system and that continued service to the public depends on broadcasters' ability to maintain adequate revenues with which to finance programming."⁵¹ It did not refer to cable television. Indeed, in 1974, cable television was not widely available and it mostly retransmitted local broadcast stations. The Nickelodeon cable network was not launched until 1979.⁵² Unlike broadcast stations, cable networks are not solely dependent on advertising

⁴⁷ MTV Comments at 4.

⁴⁸ *Id* at 16.

⁴⁹ MTV Comments at 3-4.

⁵⁰ H.R. Rep. No. 101-385, 1990 U.S.C.C.A.N. 1605, 1612 (1990).

⁵¹ *1974 Policy Statement*, 50 FCC 2d at 9 (emphasis added).

⁵² James V. Healion, New Look For Kids' TV, The Bryan Times, May 17, 1979.

revenues because they receive subscriber fees. Thus, ruling that *Zevo-3* violates the commercial limits should not have a significant impact on cable revenues.⁵³

C. Although No Rule Changes are Necessary to Rule on the Petition, CCFC would Support a Reexamination of the Children’s Advertising Policies in Light of Recent Developments

Even though Nicktoons’ airing of *Zevo-3* violates existing law and policy, CCFC supports revisiting the children’s television rules adopted in 1991, as the nature of marketing and children’s media has changed significantly in the last two decades. Specifically, CCFC supports Dr. Kunkel’s suggestion that the Commission could “issue a declaratory ruling that *Zevo-3* clearly violates the separation principle” while “concurrently issu[ing] a Notice of Proposed Rulemaking to clarify and/or revise its policy” on children’s programming.⁵⁴

Several recent developments suggest that it would be desirable to reexamine the adequacy of the policies on marketing to children that date from the early 1990s. First, as the Commission detailed in the Children’s Notice of Inquiry in October 2009, “[c]hildren today live in a media environment that is dramatically different from the one in which their parents and grandparents grew up decades ago.”⁵⁵ Among other things, children are increasingly online, they spend more time using some form of media, and they often using two or more kinds of media simultaneously. The fact that children are exposed to advertising spokecharacters online and the same characters in television programming may make it even more difficult for children to distinguish between advertising and programming.

⁵³ It is estimated that Nickelodeon subscriber charged to cable operators was forty-four cents in 2009. Trefis Team, *Growing Nickelodeon Subscriber Fees Important for Viacom’s Stock*, <http://www.trefis.com/articles/12706/growing-nickelodeon-subscriber-fees-important-for-viacoms-stock/2010-03-08> (last visited Nov. 3, 2010).

⁵⁴ Kunkel Comments at 16.

⁵⁵ *Empowering Parents and Protecting Children in an Evolving Media Landscape*, 24 FCC Rcd 13171, 13174 (2009) (“*Empowering Parents NOP*”)

Second, as the FCC noted in the Embedded Advertising Notice, “content providers may be turning to more subtle and sophisticated means of incorporating commercial messages into traditional programming,” and “industry appears to be turning increasingly to embedded advertising techniques.”⁵⁶ The increase in embedded advertising and other techniques for blurring the lines between traditional programs and advertising provides a further reason to examine the FCC’s children’s advertising policies.

Finally, in recent years, childhood obesity has become an epidemic and is leading to significant public health problems.⁵⁷ The FCC has recognized that a “significant concern with children’s exposure to media is the harms that may arise from advertising specifically directed to children and used to influence children’s consumption of products” and that “[s]ome of these products may be unhealthy food that can promote obesity.”⁵⁸

For all of these reasons, CCFC supports a re-examination of the FCC’s children’s advertising policies. But we stress that it is neither necessary nor desirable to delay ruling on CCFC’s request for a declaratory ruling while such a review is underway.

IV. Granting the Declaratory Ruling Does Not Present any First Amendment problems

Skechers contends that “the Commission could not heed CCFC’s request without violating the First Amendment.”⁵⁹ Similarly, ANA suggests that the grant of CCFC’s Petition would raise First Amendment problems, while reserving a more detailed constitutional analysis to its reply comments.⁶⁰ These concerns are ill-founded.

⁵⁶ Embedded Advertising NPRM at 43195.

⁵⁷ See, e.g., Institute of Medicine, Food Marketing to Children and Youth: Threat or Opportunity, Ch. 2 (2006).

⁵⁸ *Empowering Parents NOI* at 13180-81.

⁵⁹ Skechers Comments at 11.

⁶⁰ ANA Comments at 11-12.

As discussed above, CCFC merely request that the Commission interpret how the existing law and policy apply to Nicktoons' airing of *Zevo-3*. Since neither the CTA nor the FCC rules and policies regarding children's advertising have been found to violate the First Amendment, similarly the application of these laws and policy to a particular set of facts would not violate the First Amendment.⁶¹

Although CCFC cannot address arguments that ANA has not yet made, we do disagree with Skechers' assertion that under *Central Hudson*, finding *Zevo-3* to be commercial matter or a program-length commercial would amount to an outright ban, and that "even in the context of commercial speech, an outright ban on certain types of speech will rarely, if ever, survive First Amendment scrutiny."⁶² Under the first prong of the *Central Hudson* test, commercial speech is protected by the First Amendment only if it is not misleading.⁶³ *Zevo-3*'s intermixture of program content and commercial material is misleading to children, and thus, it is not protected by the First Amendment. The FCC has found that the "intermixture of related program and

⁶¹ Indeed, in passing the CTA, the Congress addressed the constitutionality of the commercial limits. Children's Television Act, Pub. L. No. 101-437, finding 4 ("special safeguards are appropriate to protect children from overcommercialization on television"). See also H.R. Rep. No. 101-385, 1990 U.S.C.C.A.N. 1605, 1612 (1990) ("The Committee inquired with great care into the constitutionality of this legislation, and determined that imposing commercial time limits and an affirmative obligation on licensees to serve the special needs of children was in no way violative of the requirements of the Constitution."); S. Rep. No. 101-227, at 27 (1989) ("The Committee examined closely the constitutionality of this legislation. It determined that imposing reasonable commercial time limits and an affirmative obligation on licensees to serve the special needs of children in no way would violate the Constitution."). In addition, the FCC fully considered the constitutionality of its action in adopting its rules and policies. *CTA Report and Order*, 6 FCC Rcd at 2118 ¶ 44 ("Given the First Amendment context of [children's program-length commercials], our approach is a restrained one.").

⁶² Skechers Comments at 11-12, citing *Central Hudson* and *Virginia State*. CCFC also takes issue with Skechers' characterization of a declaratory ruling as an outright ban.

⁶³ *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980) ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.").

commercial material” causes “confusion and *deception*.”⁶⁴ And as Dr. Kunkel explains, recent research supports the finding that “if young children are unaware of persuasive intent, then commercial practices aimed at them may be considered inherently unfair and deceptive.”⁶⁵ Parents may also be misled in thinking that *Zevo-3* is a program rather than a commercial.

Moreover, even if enforcing the advertising limits and separation requirements could be construed as an “outright ban,” the reason that the Supreme Court generally disfavors outright bans of commercial speech is that is paternalistic to deprive the public of accurate and useful information under the guise of protection is viewed as paternalistic.⁶⁶ Although it is appropriate for courts to assume that well-informed adults will act in their own best interests, children lack this capacity.⁶⁷

⁶⁴ 1991 *Children’s Television Policies and Rules*, Order on Reconsideration, 6 FCC Rcd 5093, 5098 ¶ 28 (emphasis added).

⁶⁵ Kunkel Comments at 3.

⁶⁶ E.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976), which is cited in Skechers Comments at 12.

⁶⁷ Moreover, unlike the pharmacy ads disclosing the price of prescription drugs in *Virginia State Bd.*, *Zevo-3* does not contain any significant informational value for children. The Commission should also reject the suggestion that it should apply strict scrutiny rather than the *Central Hudson* test for commercial speech. MTV Comments at 22; ANA Comments at 12. As discussed above, *Zevo-3* is the functional equivalent of a 22-minute commercial.

CONCLUSION

For the foregoing reasons, CCFC renews its request that the Commission promptly issue a declaratory ruling that *Zevo-3* violates the CTA and or the FCC's rules and policy concerning advertising to children.

Respectfully Submitted,

Matthew Rich
Law Student
Georgetown Law

Angela Campbell, Esq.
Guilherme Roschke, Esq.
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9535

November 8, 2010

Counsel for Campaign For A Commercial-Free Childhood

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z-strap X Search

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Z-Strap Shoes | Super Z Shoes | Z Strap Sneakers for Boys| Hook ... ☆
Shop SKECHERS online featuring our best selling shoes, sandals, sneakers and boots for men, women & kids. Free Shipping for all VIP Members.
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Oct 28, 2010 ... Skechers **Z Strap** - 239 results like the Skechers Boys Black **Z Strap Grenadier Z Trax Z-strap** Shoes, Skechers Boys Black Grenadier Z Velocity ...
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Videos for z-strap

 SKECHERS Super Z Strap Kids Sneakers 31 sec - Apr 16, 2009 Uploaded by skechersdotcom youtube.com	 Z-Strap Stree Racer III SZ10-30NT 30 sec - May 3, 2010 Uploaded by SKECHERSCommercials youtube.com
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Ads

 TravelSmith - Women's Rieker Antistress Liv \$92.98 - TravelSmith	15% Off Z Strap Use Code 15OFF & Save 15% Sitewide at Shoes.com. Free SHI! www.Shoes.com/Skechers
 Z Strap Save On Z Strap. Compare Prices, Product Reviews. Shopzilla.com	See your ad here »

1

ATTACHMENT B-1

Z-Strap Shoes | Super Z Shoes | Z Strap Sneakers for Boys | Hook and Loop Strap Sneakers | Velcro Str – SKECHERS Official Site

http://www.skechers.com/shoes-and-clothing/brands/z-strap/list

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Kids Z-STRAP

NEVER TIE YOUR SHOES AGAIN!

Easy one-strap shoes for action-packed superheroes! Check out our other hot boys' styles: **Hot-Lights**, **Alrators**, and **Luminators** sneakers.

You are here: [Home](#) > [Z-Strap Shoes](#)

Color: Size: Price Range: Shoes per Page: Page Sorting:

You've selected 57 shoes.

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	Boys' Hot Lights: Deflectord - Turbo S \$50.00	1 more color!	
	Boys' Z Strap: Grenadier - Z Trax \$35.00	2 more colors!	
	Boys' Hot Lights: Deflectord - Turbo S \$50.00	1 more color!	
	Boys' Hot Lights: Deflectord - Turbo S \$50.00	1 more color!	
	Boys' Hot Lights: Deflectord - Turbo S \$50.00	1 more color!	

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- + SIZE**
- + PRICE RANGE**
- + COLOR**

http://en-us.www.mozilla.com/en-US/firefox/central/

Screenshot from Skechers.com. <http://www.skechers.com/shoes-and-clothing/brands/z-strap/list> (Nov. 8, 2010).

SKECHERS

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Boys' Z Strap: Grenadier - Z Trax
SKECHERS Sport - View All - Style #95504
\$35.00 USD
Join VIP Club & Get FREE SHIPPING

He'll go a mile a minute in the SKECHERS Grenadier-Z Trax shoe. Smooth leather upper in a zigzag strap casual sporty sneaker with stitching and overlay accents. Cooling mesh panels. [Read more.](#)

Selected Color: BLACK

Available Sizes (click one to select): [Size Chart](#)
N=Infant & Toddler Sizes
L=Pre/Grade School Sizes

10.5 - L	11 - L	11.5 - L	12 - L	12.5 - L	13 - L	13.5 - L
1 - L	1.5 - L	2 - L	2.5 - L	3 - L	3.5 - L	4 - L
4.5 - L	5 - L	5.5 - L	6 - L	6.5 - L	7 - L	

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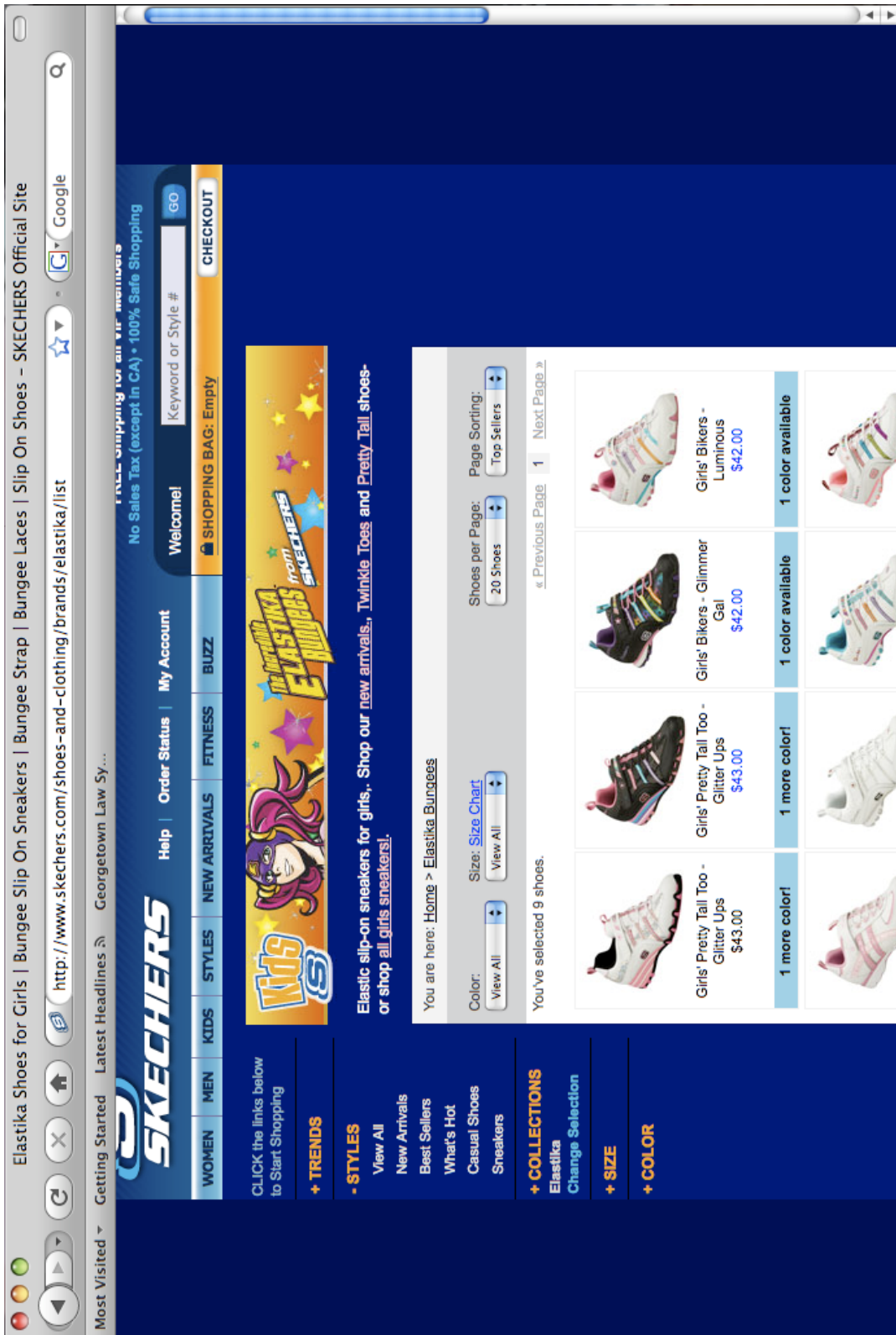
What's Hot

Athletic Shoes

Boots

Screenshot from Skechers website. Z-Strap character featured on the bottom right of the comic image.
http://www.skechers.com/shoes-and-clothing/styles/what_s_hot/product/z_strap_grenadier_-_z_trax/bbk/
 (Nov. 8, 2010).

ATTACHMENT C-1



Screenshot from Skechers website. <http://www.skechers.com/shoes-and-clothing/brands/elastika/list> (Nov. 8, 2010).

ATTACHMENT C-2

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Girls' Bikers - Sweet Spark
SKECHERS USA - Best Sellers - Style #82435
\$33.00 USD
Join VIP Club & Get FREE SHIPPING

Add some glittering fun with the SKECHERS Bikers-Sweet Spark shoe. Leather, synthetic and mesh upper in a slip on casual sneaker with stitching and overlay accents. Colorful fabric and glitter side stripes. [Read more.](#)

Selected Color: WHITE/MULTI

Available Sizes (click one to select): [Size Chart](#)
N=Infant & Toddler Sizes
L=Pre/Grade School Sizes

10.5 - L	11 - L	11.5 - L	12 - L	12.5 - L	13 - L	13.5 - L
1 - L	1.5 - L	2 - L	2.5 - L	3 - L	3.5 - L	4 - L
4.5 - L	5 - L	3 - N	4 - N	5 - N	5.5 - N	6 - N
6.5 - N	7 - N	7.5 - N	8 - N	8.5 - N	9 - N	9.5 - N
10 - N						

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The Incredibles ELASTIKA BUNGIES

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Screenshot from Skechers website. Elastika is the featured image on the comic book.
http://www.skechers.com/shoes-and-clothing/styles/what_s_hot/product/bikers_-_sweet_spark/wmlt/ (Nov. 8, 2010).

ATTACHMENT D

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Shoe & Clothing Rating

Boys' Supercharger - Evoke

Airators Shoes - Hook and Loop Shoes - Style #92707

\$45.00 USD

Join VIP Club & Get FREE SHIPPING

Give him charged-up style with the SKECHERS Supercharger-Evoke shoe. Leather, synthetic and mesh upper in an air cooled sporty casual sneaker with zigzag strap front.

[Read more.](#)

Selected Color: BLACK/ROYAL

Available Sizes (click one to select): [Size Chart](#)

N=Infant & Toddler Sizes

L=Pre/Grade School Sizes

10.5 - L	11 - L	11.5 - L	12 - L	12.5 - L	13 - L	13.5 - L
1 - L	1.5 - L	2 - L	2.5 - L	3 - L	3.5 - L	4 - L
4.5 - L	5 - L	5.5 - L	6 - L	6.5 - L	7 - L	

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Screenshot from Skechers website. Kewl Breeze is the featured image on the comic book.
http://www.skechers.com/shoes-and-clothing/styles/what_s_hot/product/supercharger_-_evoke/bkry/ (Nov. 8, 2010).

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Skechers

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Price: **\$22.52 - \$39.99**

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Sizing info

Color: Charcoal/White

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ATTACHMENT E

Screenshot from Amazon.com. <http://www.amazon.com/Skechers-Vert-Kewl-Breeze-Sneaker-Charcoal/dp/B003AU4MI8> (Nov. 8, 2010).